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Q&S QUINN & SCATTINI Lawyers

Issue 4

Avoid the Pitfall of Buying Houses with Unapproved Structures or Improvements

Business & Property Team

Often we see buyers enter into contracts to purchase property and later discover the lack of council approval for the building and/or any improvement done on the property. What does this mean for the buyer?

Buying a property with any improvements which have not been approved by the local council can be a costly mistake.

What are Improvements?

Improvements mean any structures, extensions, additions, alterations or installation works that are done on a property or an existing dwelling. Examples include the house itself, patios, decks, pergolas, garage, pool etc. Before any building works can commence, a plan specifying the details of the proposed work must be submitted to the local council for approval. Proposed building work plans can also be submitted to a private building certifier for approval. If the works are substantial (or outside the scope of a private certifier), a development approval will be required from the council.

Once approval is granted, the work can then commence. When the work is complete, the council should be notified or private certifier engaged to ensure the works have been completed in accordance to the approval, and for final inspection certificates to be issued.

Does it Matter from the Buyers' Perspective?

It certainly does. Standard Condition 7.6 of the Real Estate Institute Queensland (**REIQ**) Residential House and Land Contract (**REIQ Contract**) states that any valid notice or order by any competent authority (such as local council) must be fully complied with:

- if issued before the contract date, by the seller; or
- if issued on or after the contract date, by the buyer.

In other words, the buyer assumes liability for any unapproved alterations or improvements to the house discovered after a contract is signed. Such liability may include the cost of engaging a certifier, obtaining council approval or even demolition of the structures if they cannot be rectified to comply with the council's regulations. This can be a costly exercise.

But my Building/Pest Inspector did not Specifically Mention the Structures or Alterations to be an Issue?

Building and pest inspectors check the physical details, soundness and any damage on the property including any improvements. Building and pest inspectors are not necessarily qualified to advise whether those alterations have

received council approval and would usually recommend the council to be consulted for further enquiry.

Can the Buyer Terminate the Contract if an Unapproved Improvement is Found?

Unfortunately no. The Standard REIQ Contract in Queensland does not contain any provision which allows buyers to terminate if any unapproved structures are found after the contract is signed.

How can Buyers Protect Themselves?

Consult a lawyer before you sign any contract. Since the Standard REIQ Contract provides no recourse or a way out, we recommend a special condition to be inserted into the contract. This special condition will allow the buyer the opportunity to make enquiries with the council to check for any unapproved structures or alterations, and if one is found, the buyer may have the option to terminate the contract or to negotiate further.

Quinn & Scattini Lawyers are highly experienced with all types of property matters. We can assist buyers with any pre-contractual advice and negotiation including drafting special conditions to be inserted in the contract. Do not sign a contract until you have sought legal advice.

Real Life Q&A about Wills

Russell Leneham
Director
Wills & Estates

One of our staff members saw the following posted in an online forum:

"Wills. How do they work?? Is it magnets? Apparently the post office Will Kits are no good. And I hear "Get a proper one with a lawyer." Since this is not America, and we don't have "a lawyer," I'd have to go to a random law office to have one drawn up. I assume it stays with them. What if they close up shop? What happens to my Will? What happens if the law office is some local small one man shop, and that one man dies? Who works out what is what? And if none of that happened, and both my wife and I die, how does everyone else know that I made a will and it is at Joe Bloggs law office? If we both die, how does Joe Bloggs law office know that one of his clients died and that their will needs to be executed? Do they have special "will lawyers" like they do with say property? I don't want my used $5 t-shirts to go to just anyone."

Quinn & Scattini Lawyers' Director, Russell Leneham, responds as follows:

"I have seen home-made wills that are fine, and I have seen home-made wills that are rubbish. There are many risks in making a home-made will, including the risk that what makes perfect sense to you when you write it, may not make any sense to the person who reads it.

There are many solicitors who make wills. But there are very few of them who are

Accredited Specialists in wills and estates – only about 30 in all of Queensland.

Occasionally a legal practice gets sold or closes. Any wills they hold in safe custody will usually go to the new owner of the practice.

If there is no new owner, the will would be taken by the Queensland Law Society or the Public Trustee of Queensland.

At Quinn & Scattini, when we make a will for you, we also give you Will Location Cards that you can give to your family members, letting them know that you have made a will and that it is held by us.

We do not charge a fee for our safe custody service.

Every worker has superannuation. And you probably should have life insurance through your superannuation fund. So even if you don't have much by way of other assets, it is important to have a well-made will. And it doesn't cost the earth."

Russell, is an Accredited Specialist in Wills & Estates and a Registered Trust & Estate Practitioner with the Society of Trust & Estate Practitioners.

Russell and his expert team can assist with all your estate needs, including estate planning, estate management, and estate disputes.

Variation of Parenting Orders

Taryn Hokin
Associate
Family & Facto
Law Team

So, you have obtained formal Parenting Orders ("**Orders**") but you want to make a change to them. Easy right? Not so fast.

Orders are essentially a structured arrangement outlining the manner in which children shall live and spend time with their parents. Orders can be made by consent or they can be imposed by the court. Orders can be varied with the consent of both parties.

If parents agree to vary their existing Orders, they may:

Enter into a Parenting Plan

In order to be recognised, a Parenting Plan (**Plan**) must be written, signed and dated by both parents. It does not need to be filed in court and it does not require the parents to obtain independent legal advice. If the Plan contradicts the existing Orders it will override them to the extent of any inconsistencies.

In other words, the particular Orders which are not interfered with by the Plan will continue to be binding upon the parents.

A Plan is non-binding. This means that if a parent chooses not to follow the terms of the Plan there are no legal ramifications for them.

Make an Application to Court Seeking to Vary the Existing Orders

Parents who seek to vary their existing Orders by consent may choose to formalise the amendments being made by making an application to court requesting

that new Orders issue which encompass the changes.

Changing Orders in this manner can only be done with the consent of both parents. Once further Orders issue they will be binding upon the parents. Amending Orders by consent is relatively straightforward.

The difficulty arises when one parent seeks to vary the existing Orders and the other parent refuses to do so. If this occurs, both parents must continue to comply with the existing Orders until further Orders are made. Non-compliance with Orders can result in a variety of different legal consequences.

The parent seeking to change the Orders will be required to follow the process as outlined below:

In the vast majority of cases, the parent seeking the amendment to the Order will be required to invite the other parent to a Family Dispute Resolution Conference (**FDRC**) so as to genuinely attempt to resolve the matter by consent.

If the issue is not resolved by the parties at the FDRC, the parent seeking to amend the Orders will be required to make an application to the court.

Before the court can accept a parent's application to vary Orders they must find that there has been a significant change in circumstances which warrants the reopening of the matter. If the parent seeking to change the Orders cannot demonstrate that there has been a significant change in circumstances, the court can dismiss the application.

Circumstances where the court has considered there to have been a significant change in circumstances have included when an Order has become entirely unworkable, where the Orders no longer reflect the actual arrangements for the child, where a parent has relocated, where a parent has lost their job, when a parent has remarried, when children have expressed a wish to spend time with or live with a different parent.

The court can also reconsider existing Orders in circumstances where a relevant and material factor was not disclosed to the court when the existing Orders were made. Each case will turn on its own facts. The court will consider and assess the facts of each case when determining whether a significant change in circumstances has occurred.

As with all Orders, the court will consider the child's best interests as paramount when determining whether to vary an existing Order. The court can also consider varying existing Orders in circumstances where a parent has breached the current Orders.

This kind of variation occurs via a different process than that outlined above and requires the non-breaching parent to make a different kind of application to the court that is, a contravention application.

If you are considering varying an existing Order you should seek legal advice so as to determine your prospects of success.

Mandatory Sentencing and Limiting Judicial Discretion

Criminal Law Team

In recent years, Queensland parliament has introduced numerous new mandatory sentencing regimes which effectively limit the discretion of the judiciary to impose a sentence that is fair and just in the circumstances.

In particular, the following mandatory sentencing regimes have the potential to result in sentences that do not adequately take into account the circumstances of offending, and are regularly used in Queensland.

Trafficking Dangerous Drugs

A mandatory sentencing rule for an offence of trafficking in dangerous drugs, which has been in force since late 2013, provides that if a court imposes a period of imprisonment for an offence of trafficking in dangerous drugs, that "the court must make an order that the person must not be released from imprisonment until the person has served a minimum of 80% of the prisoner's term of imprisonment".

Given the serious nature of a trafficking in dangerous drugs charge, these charges almost always result in a period of imprisonment. The courts have no discretion to impose a parole release date that is less than 80% of the offender's head sentence. Therefore, this rule effectively limits the court's discretion to formulate a sentence that takes into account the particular circumstances of the offender and can lead to a sentence that is excessive and unjust.

These provisions, combined with the amendments contained in the *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013*, are of great concern to those in the legal profession.

Essentially, these provisions provide that if there is a reasonable suspicion that a person has committed a serious crime and that any of the person's property or wealth was not required by legitimate means, that the court must make an order forfeiting this property to the state.

Essentially, an accused person charged with trafficking dangerous drugs now bears the onus of showing that their property and funds have been obtained lawfully.

Interestingly, this can also includes gifts given to other persons in the previous six years of the offence date.

Failing to Stop a Motor Vehicle

The offence of failing to stop a motor vehicle, which is contained in section 754 of the *Police Powers and Responsibilities Act 2000* (Qld), provides that the minimum mandatory penalty for failing to stop a motor vehicle directed to do so by a police

vehicle is 50 days imprisonment served wholly in a correctional facility or 50 penalty units.

This section does not allow for judicial discretion when sentencing, and does not take into account the offender's reasons for failing to stop.

In addition to this penalty, the offender's licence must be disqualified for a minimum of two years.

A major issue with this legislation is that police vehicles also include unmarked police vehicles, and failing to stop for an unmarked vehicle can therefore mean a person can be liable for a mandatory period of imprisonment.

Weapons Act Reforms

Reforms to section 50 of the *Weapons Act 1990* (Qld) now also require minimum mandatory sentences be imposed by courts if a person is found to have unlawfully possessed a weapon.

Depending upon the type of weapon and whether it was used in connection with the commission of an offence, the court must impose a minimum penalty of six months to 18 months served wholly in a correctional centre. Once again, this limits the court's discretion to impose a penalty that takes into account all of the circumstances of the offending.

If you or someone you know has been charged with any of the above offences, our Criminal Law Team would be happy to provide assistance. You can call us on 1800 999 529 to speak with a member of our team.

Connect with

Quinn & Scattini Lawyers

mail@qslaw.com.au

www.qslaw.com.au

1800 999 LAW

(1800 999 529)

Brisbane CBD
Level 2, 102 Adelaide Street
(Next to King George Square)
Brisbane City
GPO Box 2612
Brisbane QLD 4001
Phone: (07) 3222 8222
Fax: (07) 3221 5350

Beenleigh
99 George Street
(Opposite Court
Cnr York Street) Beenleigh
PO Box 688
Beenleigh QLD 4207
Phone: (07) 3807 7688
Fax: (07) 3807 7514

Cleveland
141 Shore Street West
(Opp. Train Station)
Cleveland
PO Box 898
Cleveland QLD 4163
Phone: (07) 3821 2766
Fax: (07) 3821 2083

Gold Coast
1/2406 Gold Coast Hwy
(Cnr Markeri St.)
Mermaid Beach
PO Box 293
Mermaid Beach QLD 4218
Phone: (07) 5554 6700
Fax: (07) 5554 6900

Jimboomba
Shop 1
689 Cusack Lane
Jimboomba
PO Box 705
Jimboomba QLD 4280
Phone: (07) 5540 3940
Fax: (07) 5540 3233